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# Supreme Court of the United States

STONERIDGE INVESTMENT PARTNERS, LLC,

*Petitioner,*

—v.—

SCIENTIFIC-ATLANTA, INC. and MOTOROLA, INC.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF OF THE AMERICAN BANKERS ASSOCIATION, THE ABA SECURITIES ASSOCIATION, THE CLEARING HOUSE ASSOCIATION L.L.C. AND THE FINANCIAL SERVICES ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS


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*Laidlaw* v. *Organ*, 15 U.S. (2 Wheat.) 178 (1817) ..... 26

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15 U.S.C. § 78t(e) ..... 6-7

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Private Securities Litigation Reform Act of 1995
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**Other Authorities**

141 CONG. REC. S8896 (daily ed. June 22, 1995) ..... 17

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Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*,
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Brief for Respondents, *Central Bank*,
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Brief for the Securities and Exchange Commission as *Amicus Curiae* in Support of Respondents, *Central Bank*, 511 U.S. 164 (No. 92-854), 1993 WL 13006275 ..... 29

Brief of *Amicus Curiae* Trial Lawyers for Public Justice et al. in Support of Respondents, *Central Bank*, 511 U.S. 164 (No. 92-854), 1993 WL 13006270 ..... 29

John C. Coffee, Jr., *Reforming the Securities Class Action*, 106 COLUM. L. REV. 1534 (2006) ..... 20

COMM'N ON THE REGULATION OF U.S. CAPITAL MKTS. IN THE 21ST CENTURY, REPORT AND RECOMMENDATIONS (Mar. 2007), *available at* http://www.uschamber.com/publications/reports/0703capmarketscomm.htm ..... 16

Todd Davenport, *The Uneven Evolution of Accounting Standards*, AMERICAN BANKER, July 28, 2004 ..... 19

Patrick M. Garry et al., *The Irrationality of Shareholder Class Action Lawsuits*, 49 S.D. L. REV. 275 (2005) ..... 16

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H.R. REP. NO. 104-369 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 730 ..... 17

Int'l Swaps & Derivatives Ass'n, Summaries of Market Survey Results, http://www.isda.org/statistics/recent.html (last visited Aug. 7, 2007) ..... 19

LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION (5th ed. 2004) ..... 23, 24

OFFICE OF THE COMPTROLLER OF CURRENCY, OCC'S REPORT ON BANK DERIVATIVES ACTIVITIES, FOURTH QUARTER 2006, *available at* http://www.occ.treas.gov/ftp/deriv/dq406.pdf ..... 19

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RICHARD PAINTER ET AL., PRIVATE SECURITIES LITIGATION REFORM ACT: A POST-ENRON ANALYSIS (Federalist Soc'y for Law & Pub. Pol'y Studs. 2002), *available at* http://www.fed-soc.org/doclib/20070323_PSLRAFINALII.pdf..... 16

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S. REP. NO. 109-14 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3..... 16

Harry Shulman, *Civil Liability and the Securities Act*, 43 YALE L. J. 227 (1933) ..... 30

ANJAN V. THAKOR, THE UNINTENDED CONSEQUENCES OF SECURITIES LITIGATION (U.S. Chamber Institute for Legal Reform 2005), *available at* http://www.instituteforlegalreform.org/ issues/ docload.cfm?docId=857 .....20-21

## STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Its members, located in each of the fifty States and the District of Columbia, include financial institutions of all sizes and types, both federally and state-chartered. ABA members hold a majority of the domestic assets of the banking industry in the United States.

The ABA Securities Association ("ABASA") is a separately chartered trade association and non-profit affiliate of the American Bankers Association. ABASA is devoted to forming and exploring policy that relates to banking organizations involved in the securities business.

The Clearing House Association L.L.C. (the "Clearing House"), founded over 150 years ago, is an association of eleven leading commercial banks that, through an affiliate, provides payment, clearing and settlement services to its member banks and other financial institutions.

The Financial Services Roundtable is a national association whose membership includes 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer.

The ABA, ABASA, Clearing House and Financial Services Roundtable (collectively, "*Amici*") regularly present the views of their members on important public policy issues

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[1] Pursuant to Rule 37.6, counsel certifies that this brief was not authored, in whole or in part, by counsel for any party, and no person or entity other than *Amici*, their members, and their counsel contributed monetarily to the preparation or submission of the brief. The parties have consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court.

that impact the financial services industry by, among other things, appearing as *amicus curiae* in this Court.

The issue presented here—whether this Court should create a private cause of action under Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act") against banks and other financial institutions, vendors, law firms and other third parties that do business with publicly-traded companies—is of critical importance to *Amici* and the Nation's economy. The plaintiffs' bar in securities class actions reflexively targets the "deep pockets" of financial services companies when the issuer or other primary actors, including the issuer's executives, are bankrupt or otherwise judgment-proof. These strike suits reduce the efficiency and competitive position of the U.S. capital markets.

Petitioner has developed a so-called "scheme" theory that largely would eviscerate not only this Court's holding in *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), that Section 10(b) does not permit a private cause of action for aiding and abetting, but also Congress's subsequent express refusal to grant such authority to private plaintiffs in the Private Securities Litigation Reform Act of 1995 ("PSLRA"). If this Court accepts Petitioner's open-ended theory, private plaintiffs could sue all financial institutions that did business with a public company simply by claiming that the financial institution was part of the public company's "scheme to defraud."

Under Petitioner's "scheme" theory, the liability of a financial institution would turn on whether the "purpose and effect" of a transaction was to portray falsely a company's financial condition. Because of the inherently amorphous nature of Petitioner's proposed legal standard, financial institutions could face potentially ruinous liability based on their mere participation in routine financial-markets transactions whenever a public company is accused of misrepresentation in respect of that transaction.

Moreover, because of the highly subjective nature of Petitioner's proposed legal standard, financial institutions would be unable to extricate themselves from meritless class actions at the motion to dismiss stage. Instead, faced with the risk that a jury could enter a massive damages award, financial institutions would be coerced into costly and unfair settlements. Such a legal regime would, in effect, make financial institutions insurers for losses suffered by investors in public companies.

This Court should not rewrite the securities laws. If adopted, Petitioner's "scheme" theory would negatively impact the availability of bank financing and risk-mitigation transactions, deter socially beneficial economic transactions, impair the proper functioning of this Nation's financial markets and, ultimately, threaten the safety and soundness of individual financial institutions and the Nation's banking system.

## STATEMENT OF THE CASE

Plaintiffs filed this class action on behalf of certain present and former shareholders of Charter Communications, Inc. ("Charter"), a cable television provider, against Charter itself and its executives and auditor, as well as Scientific-Atlanta, Inc. and Motorola, Inc., two equipment vendors that had done business with Charter ("Vendors"). Plaintiffs alleged that Charter defrauded plaintiffs through the issuance of false and misleading financial statements. Plaintiffs further alleged that the Vendors were liable as primary violators of Section 10(b) of the 1934 Act because they participated in a "scheme to defraud" by engaging in certain "sham" business transactions with Charter.

Petitioner contends that the Vendors should be liable for participating in these "sham transactions" because the Vendors knew that Charter would use those transactions "to further the scheme to overstate [its] revenue and operating cash flow in financial statements which were filed with the SEC and issued to the investing public." (Pet. Br. 9, 12.)

Petitioner further claims that the Vendors "deceived" Charter's auditor about the nature of the transactions by "backdating" and otherwise falsifying certain transaction documents. (*See id.* at 6-9; J.A. 55a-60a (SAC ¶¶ 100-10).) Petitioners do not allege that the Vendors were involved in, or had any control over, Charter's accounting and financial reporting of the challenged transactions.

The district court dismissed the Section 10(b) claims brought against the Vendors, finding that their alleged conduct amounted to aiding and abetting, not a primary violation of Section 10(b). (Pet. App. 69a.) The Eighth Circuit affirmed. (*Id.* at 10a-11a.)

## SUMMARY OF ARGUMENT

This case directly implicates this Court's decision in *Central Bank*, which held that Section 10(b) does not authorize a private cause of action for aiding and abetting a securities fraud. Just a year after *Central Bank*, Congress enacted the PSLRA and expressly decided not to permit a private right of action for "aiding and abetting," while providing the power to bring such claims to the SEC, the expert agency responsible for the supervision of our Nation's securities markets. Because Petitioner's "scheme" theory is but another form of "aiding and abetting" expressed in different terminology, Petitioner and its *amici* effectively ask this Court to overrule *Central Bank* and to ignore Congress's refusal to grant such authority to the plaintiffs' bar in the PSLRA.

In advancing their "scheme" theory, Petitioner and its *amici* argue that the distinction between a primary violation of Section 10(b) and "aiding and abetting" such a violation is nothing more than a legal technicality that should not permit persons with knowledge of the potential for securities fraud to escape responsibility for their actions. This is wrong.

First, it is Congress's prerogative to decide what actions subject a person or entity to civil liability for securities fraud under Section 10(b). In the PSLRA,

Congress exercised that prerogative and clearly decided that, as a matter of national policy, private "aiding and abetting" claims should not be allowed. In so doing, Congress decided that the distinction between a primary violation and aiding and abetting is not a technicality at all, but an important limitation on the reach of Section 10(b) in private class actions.

Second, notwithstanding Petitioner's protestations that secondary actors would enjoy immunity under the Eighth Circuit's standard, aiders and abettors of violations of Section 10(b) are not beyond the reach of the law. In the PSLRA, Congress specifically authorized the SEC to bring enforcement actions against aiders and abettors and, if warranted, to impose large financial penalties and other forms of punitive relief. In addition, such aiders and abettors are subject to federal and state criminal prosecutions and state civil litigation.

By any measure, Petitioner's "scheme" theory is an attempted end-run around Congress's decision not to allow private aiding-and-abetting claims. Fundamentally, Petitioner's "scheme" theory cannot be reconciled with this Court's decision in *Central Bank* that a private plaintiff must establish every element of Section 10(b) against each defendant to establish a primary violation. In particular, as applied to the Vendors' conduct in this case, Petitioner's "scheme" theory would impose liability improperly on the Vendors for conduct that was (1) not relied on by Charter's investors, (2) not "in connection with" the purchase or sale of Charter's securities, and (3) not the cause of the losses allegedly suffered by Charter's investors.

Petitioner's proposed "purpose and effect" test to implement its "scheme" theory also would exacerbate the amount of vexatious securities fraud litigation and thereby undermine one of the central goals of the PSLRA. This test would allow the plaintiffs' bar to cast a broad net, based on a vague and unclear test, to ensnare "deep pocket" secondary

actors such as *Amici*'s members in virtually any securities case based on a public company's alleged misstatements. By contrast, the Eighth Circuit test properly excludes from Section 10(b) civil liability to private parties based on conduct amounting to aiding and abetting, and provides clear guidelines as to what conduct is prohibited.

The claim of certain *amici* that Petitioner's "scheme" theory would have supported a fraud claim against the Vendors at common law is both irrelevant and wrong. As this Court has long held, the common law is irrelevant when this Court has already authoritatively construed a federal statute, particularly when the cause of action has been implied by courts rather than provided by Congress. In any event, the Vendors' conduct here would not constitute fraud at common law because Charter's investors did not *rely* on that conduct; such a claim would constitute, at most, aiding and abetting, which this Court recognized in *Central Bank* was not imported into Section 10(b).

## ARGUMENT

### I. PETITIONER'S "SCHEME" THEORY WOULD ELIMINATE SEVERAL ESSENTIAL REQUIREMENTS OF SECTION 10(b).

In *Central Bank*, this Court rejected aiding-and-abetting liability under Section 10(b) and squarely held that a plaintiff must prove every element of a Section 10(b) claim as to each defendant based on that defendant's own conduct. Following *Central Bank*, Congress expressly refused to authorize private aiding-and-abetting claims, and chose to permit only an experienced regulator, the SEC, to pursue such claims. *See* PSLRA, Pub. L. No. 104-67, § 104, 109

Stat. 737, 757 (1995) (codified as amended at 15 U.S.C. § 78t(e)).[2]

The requirement that a plaintiff establish that each defendant committed its own primary violation is the critical limitation on liability under Section 10(b). As this Court observed in *Central Bank*, it is the concept of an *independent* primary violation of the statute that provides the demarcation between actionable primary liability under Section 10(b) and non-actionable aiding and abetting. Simply put, a primary violation involves more than "knowing and substantial assistance" of a fraud: There must be a showing that the defendant's conduct, standing alone, satisfies each element of Section 10(b). 511 U.S. at 191.

In contravention of *Central Bank*, Petitioner's "scheme" theory would permit private plaintiffs to pursue aiding-and-abetting claims under a different name. This Court should not permit private plaintiffs to evade *Central Bank* and the PSLRA by labeling conduct part of a "scheme" when that conduct is nothing more than aiding and abetting. Petitioner's effort at evasion is confirmed by its inability to draw a meaningful, much less clear, line between a "scheme" violation and non-actionable aiding and abetting.

### A. Petitioner's "Scheme" Theory Would Eliminate the Reliance, "In Connection With" and Loss Causation Requirements of Section 10(b).

By any measure, instead of satisfying the statutory requirement of an independent primary violation, Petitioner's theory would permit plaintiffs in securities fraud cases to bring a Section 10(b) claim against a bank or other financial

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[2] Congress again declined to create a private cause of action for aiding and abetting when it passed the Sarbanes-Oxley Act in 2002, despite requests from some legislators that it do so. *See, e.g.*, H.R. REP. NO. 107-414, at 54 (2002) (minority views); 148 CONG. REC. S6584 (daily ed. July 10, 2002) (amendment submitted by Sen. Shelby).

institution based on the statements and conduct of *other participants* in the alleged scheme. This form of pleading would eviscerate at least three essential elements of a Section 10(b) claim: (i) reliance; (ii) the "in connection with" requirement; and (iii) loss causation.

***Reliance.*** A defendant can be liable under Section 10(b) only if, among other things, the defendant "employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities *relies*." *Central Bank*, 511 U.S. at 191 (emphasis added); *see also id.* at 180 (to prove reliance on a secondary actor, plaintiffs must show they specifically relied on the "statements or actions" of that secondary actor). In *Central Bank*, this Court emphasized the reliance requirement in rejecting the plaintiffs' claim, stressing that "to allow the aiding and abetting action proposed in this case, the defendant could be liable without any showing that the plaintiff relied upon the aider and abettor's statements or actions." *Id.* at 180 (internal citations omitted). As the Fifth Circuit has observed, "reliance . . . is a specific, defining element of the relevant legal violation . . . ." *Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 385 (5th Cir. 2007).

Petitioner does not—and cannot—contend that investors in Charter's securities relied on the Vendors' transactions themselves, or anything else the Vendors are alleged to have done, as opposed to Charter's disclosures to investors. For the transactions *themselves* to have been deceptive, those transactions would need to be deceptive regardless of how they were accounted for and reported by Charter in its financial statements. In fact, after the transactions were executed, Charter could have reported those transactions in accordance with applicable accounting rules and Charter's other disclosure obligations. Charter's failure to comply with these requirements cannot make the Vendors primary violators of the securities laws.

By arguing for reliance on a primary violator's misrepresentation as satisfying the reliance requirement for a secondary actor's conduct, Petitioner seeks to evade a core holding of *Central Bank*. Under Petitioner's theory, an allegation of "scheme to defraud" would eliminate the need for reliance, with the effect of permitting aiding-and-abetting claims as primary violations. This is impermissible. *See also Basic Inc.* v. *Levinson*, 485 U.S. 224, 243 (1988) (proof of reliance is essential because it "provides the requisite causal connection" between a defendant's conduct and a plaintiff's injury).

***"In connection with."*** Section 10(b)'s "in connection with" requirement cannot be satisfied unless a defendant's allegedly wrongful activities "coincide" with the purchase or sale of a security. *SEC* v. *Zandford*, 535 U.S. 813, 822, 824-25 (2002); *United States* v. *O'Hagan*, 521 U.S. 642, 656 (1997). The transactions in question here did not—and indeed could not—"coincide" with any purchases or sales of Charter securities. Rather, it was only Charter's *subsequent* public issuance of financial statements allegedly improperly reflecting the effects of those transactions that could have misled investors in connection with securities transactions.

The "in connection with" requirement is not satisfied by an allegation that the "scheme" itself—an abstract concept representing the undifferentiated aggregation of all defendants' conduct—coincided with the purchase of securities. To ensure that aiders and abettors are not held liable as primary violators, *Central Bank* requires a showing that the conduct of each secondary actor independently satisfies every element of a Section 10(b) claim without regard to the conduct of other defendants. 511 U.S. at 191. This Court should not permit Petitioner to evade the requirements of a Section 10(b) cause of action by talismanically invoking the supposedly magic word "scheme," which does not appear anywhere on the face of Section 10(b). *See Central Bank*, 511 U.S. at 173; *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 214 (1976). Petitioner's

"scheme" theory would effectively read the "in connection with" requirement out of Section 10(b).[3]

***Loss Causation.*** In order to prevail on a claim under Section 10(b), this Court has held that a plaintiff must also prove facts showing "loss causation"—*i.e.*, the causal connection between a defendant's allegedly actionable conduct and plaintiff's damages. *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 342 (2005) (loss causation element requires proof that issuer's stock price declined because of revelation of defendant's statement, omission or act); *see also* 15 U.S.C. § 78u-4(b)(4) ("plaintiff shall have the burden of proving that the *act or omission of the defendant* . . . caused the loss for which the plaintiff seeks to recover damages") (emphasis added).

Here, the Vendors did not make any actionable misstatements to investors—indeed, their conduct was unknown to the market. Accordingly, the Vendors' conduct, in contrast to Charter's allegedly subsequent misstatements, could not—and did not—in any way affect the market price for Charter securities. Because no "causal connection" existed between any decline in Charter's stock price and the Vendors' conduct, Petitioner cannot demonstrate loss causation as to the *Vendors'* alleged participation in the

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[3] The decision in *In re Dynegy, Inc. Securities Litigation*, 339 F. Supp. 2d 804 (S.D. Tex. 2004), illustrates a proper application of the "in connection with" requirement to the sort of "scheme" allegations Petitioner relies on here. *See id.* at 916 (plaintiff's allegations that Citigroup structured and funded transactions with Dynegy to conceal from Dynegy's balance sheet hundreds of millions of dollars in debt and to inflate Dynegy's reported income and cash flows did not satisfy the "in connection with" requirement "[b]ecause plaintiffs in this case do not allege any facts showing that *Citigroup's* allegedly manipulative and deceptive acts coincided with sales of Dynegy securities") (emphasis added).

purported scheme to defraud. Thus, Petitioner's "scheme" theory would read loss causation out of Section 10(b).

* * *

This Court's strict adherence to each of the requirements of a Section 10(b) claim is particularly important to *Amici* and their members. *Amici*'s members provide much of the funding and financial risk mitigation for thousands of publicly-traded companies, and thereby the Nation's economy as a whole, through hundreds of thousands of financial transactions. In many cases, these transactions inherently raise complex accounting and disclosure issues within the unique knowledge of the borrower or counterparty and its accountants. Yet, under Petitioner's open-ended theory, financial institutions would face the prospect of huge liability for the improper accounting or public disclosures of their borrowers and counterparties, without any participation in that accounting or disclosure.

### B. Petitioner's "Auditor Deception" Allegations Cannot Cure Its Legally Flawed "Scheme" Theory.

Petitioner seeks to rely on allegations that the Vendors' conduct "deceived" Charter's auditors, who purportedly would have stopped Charter from perpetrating a fraud had the "sham" nature of the transactions been apparent to them. (*See* Pet. Br. 40.) These allegations cannot cure the fundamental flaws in Petitioner's "scheme" theory, because those allegations do not satisfy the essential elements of the Section 10(b) claim against the Vendors.

In the first place, any alleged "deception" of Charter's auditors by the Vendors amounts, at most, to "substantial assistance" of *Charter's* deception of its investors, *i.e.*, aiding and abetting. It is undisputed that Charter remained free—after the closing of Charter's transactions with the Vendors—to make full and accurate disclosure to its auditors and to account for and report the transactions properly. If Charter did not do so, it was only Charter and others involved in

Charter's accounting and financial reporting that "used or employed" a deceptive device to deceive investors with respect to those transactions.[4]

Section 10(b), as interpreted by the courts, provides a cause of action for defrauded *investors*. Allegations of deception that enable someone else to defraud investors—such as deception of an issuer's auditors—are not primary violations of Section 10(b). *See, e.g.*, *Filler* v. *Hanvit Bank*, Nos. 01 Civ. 9510, 02 Civ. 8251, 2003 WL 22110773, at *1, *2 (S.D.N.Y. Sept. 12, 2003) (secondary actors' alleged "false confirmations" to issuer's auditor that certain loans made to issuer were non-recourse were not a primary violation), *aff'd*, 156 Fed. Appx. 413 (2d Cir. 2005); *Lawyers Title Ins. Corp.* v. *United Am. Bank of Memphis*, 21 F. Supp. 2d 785, 799-801 (W.D. Tenn. 1998) (conduct of defendant bank that plaintiffs could not have relied on but which helped prevent primary violator's fraudulent scheme from being discovered constitutes aiding and abetting); *Wells Fargo Bank* v. *Arizona Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d 12, 27 (Ariz. 2002) (bank's conduct preventing discovery of primary violator's fraudulent scheme constitutes aiding and abetting). Even the Ninth Circuit in *Simpson*—on which Petitioner relies for its "purpose and effect" test (Pet. Br. 32-33)—recognized that deception of an *auditor*—as opposed to investors—could not form the basis for primary Section 10(b) liability. *See Simpson* v. *AOL Time Warner Inc.*, 452 F.3d 1040, 1043-44, 1052-53 (9th Cir. 2006).[5] If the law

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[4] As *Central Bank* made clear, Section 10(b) prohibits the use and employment of a deceptive device, not "giving aid to a person who commits a manipulative or deceptive act." 511 U.S. at 177.

[5] In *Simpson*, the court rejected allegations that a secondary actor committed a primary violation by (i) deliberately structuring transactions in a manner to keep Homestore's auditor from "recogniz[ing] that the revenue that Homestore recorded was related to a prior transaction funded

were otherwise, there would be no way to distinguish primary liability from aiding and abetting.

Petitioner cannot sustain its "scheme" theory by characterizing the Vendors' purported "deception" of Charter's auditors—allegedly backdating and otherwise falsifying certain transaction documents—as "conduct" or a misrepresentation or an omission.[6] Regardless of labeling, the Vendors' actions do not satisfy the elements of a Section 10(b) claim. *First*, the statements in these documents were never made publicly available or otherwise communicated to investors such that any investor could have *relied* on those statements. *Second*, the alleged deception of Charter's auditors occurred contemporaneously with the transactions and, therefore, such purported deception was not "in connection with" investors' subsequent purchases of Charter's securities. *Third*, the allegedly falsified documents were not disclosed to the market and, thus, could not have been the cause of any decline in Charter's stock price and any investor losses.

Indeed, Petitioner's theory concerning the Vendors' purported "deception" of Charter's auditors serves only to confirm that the Vendors did not commit a primary violation of Section 10(b). Petitioner concedes that Charter's "false financial statements . . . deceived investors" (Pet. Br. 38)—in

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by Homestore," and (ii) agreeing to conceal information regarding the circular nature of the transactions by documenting transactions in such a way as to "not alert [the auditor] to the nature of the round-trip transaction." 452 F.3d at 1043-44.

[6] In fact, the Vendors dealt only with Charter and had no dealings with Charter's auditors, with whom Charter dealt on its own. In any event, the Vendors owed Charter's auditors no duty to disclose information and, thus, the Vendors' purported nondisclosure of information to Charter's auditors cannot, as a matter of law, form the basis for primary liability. *See, e.g., Chiarella* v. *United States*, 445 U.S. 222, 235 (1980).

other words, that it was plaintiffs' reliance on Charter's statements that caused the alleged losses Petitioner seeks to recover in this case. Nonetheless, Petitioner claims that the Vendors are liable under a multi-step "buil[d] upon" theory, *i.e.*, the financial statements were "built upon" the deception of "Charter's auditors[, who] never would have acquiesced to the publication of those [financial statements]" had the auditors not been "deceived" by the Vendors' conduct. (*Id.* at 38, 40.) In maintaining that Charter's alleged fraud was "built upon" the Vendors' actions, Petitioner effectively concedes that the Vendors' actions, at most, aided and abetted Charter's primary violation and did not themselves constitute a primary violation.

## II. IF ADOPTED, PETITIONER'S "SCHEME" THEORY WOULD ADVERSELY AFFECT OUR NATION'S FINANCIAL MARKETS.

This Court should not create an amorphous and subjective theory of potentially catastrophic liability that would impede the important functions of banks and other financial institutions in providing the financial fuel that drives our Nation's economy. By any measure, Petitioner's "scheme" theory would create great uncertainty for banks and other financial institutions. If this theory were adopted, plaintiffs' lawyers routinely could bring coercive class actions against such institutions seeking many millions, and often billions, in damages based solely on a bank's participation in lending and other financial transactions. In these circumstances, this Court should not overturn Congress's explicit decision in the PSLRA to entrust the responsibility for deciding when to prosecute alleged aiders and abettors of securities fraud to the expert judgment of the SEC.

### A. Petitioner's Vague "Purpose and Effect" Test Cannot Be Rationally Administered and Would Lead to Arbitrary Results.

In support of its "purpose and effect" test, Petitioner tries to draw a distinction between "legitimate" and "illegitimate" transactions on which the question of primary liability would turn. (*See* Pet. Br. 6-8, 12, 14.)[7] Ignoring the statutory elements of a Section 10(b) claim, Petitioner proposes that banks and other secondary actors that engage in "legitimate" transactions with an intent to further a fraud are merely aiders and abettors, while those that engage in "illegitimate" transactions to further a fraud are primary violators. In proposing this standard, Petitioner makes no effort to define coherently "legitimate" or "illegitimate" transactions or to explain how federal judges around the Nation would apply this vague standard in deciding motions to dismiss and for summary judgment. On its face, such a test has no place in the law, much less in "'an area that demands certainty and predictability.'" *Central Bank*, 511 U.S. at 188 (quoting *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988)). In application, Petitioner's proposed standard would "lead[] to the undesirable result of decisions 'made on an ad hoc basis, offering little predictive value' to those who provide services to participants in the securities business." *Id.*

Making matters worse, Petitioner's ambiguous and fact-intensive standard would create a factual dispute in virtually every case, making it extremely difficult for innocent defendants to obtain dismissal of even the most dubious claims. Indeed, bi-partisan groups have recently concluded that this type of litigation uncertainty and risk is

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[7] One of Petitioner's *amici* goes even further, suggesting that liability turn upon whether the "business purpose" for the transaction is substantial or "insubstantial." (Br. of N.Y. State Teachers' Ret. Sys. et al., 12-13 n.6.)

severely damaging the competitiveness of the U.S. capital markets.[8]

In the face of years of litigation and the risk of massive damages at a trial, many banks and other financial services companies will have no choice but to abandon their defenses—regardless of the merits of those defenses—and to pay expensive settlements.[9] The risk of crippling jury awards means that "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit

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[8] For example, a bi-partisan commission recently formed by the U.S. Chamber of Commerce to study the current state of the U.S. capital markets concluded that the legal standard advocated by the Petitioner here would increase the cost of raising capital in the United States. COMM'N ON THE REGULATION OF U.S. CAPITAL MKTS. IN THE 21ST CENTURY, REPORT AND RECOMMENDATIONS 90-92 (Mar. 2007), *available at* http://www.uschamber.com/publications/reports/0703capmarketscomm.htm.

[9] Congress has recognized that "basic economics" can force defendants to settle "meritless" class actions that have "only a five percent chance of success" if the defendants are unable to obtain early dismissal. S. REP. NO. 109-14, at 21 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 21; *see also* S. REP. NO. 104-98, at 7 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 679, 686 (if the defendant "cannot win an early dismissal," simple economics "may dictate a settlement even if the defendant is relatively confident that it would prevail at trial") (quoting statement of former SEC Chairman Arthur Levitt). Studies confirm that virtually every securities fraud claim that survives a motion to dismiss is settled; few businesses can afford to risk a trial, regardless of the merits of the claim. *See* RICHARD PAINTER ET AL., PRIVATE SECURITIES LITIGATION REFORM ACT: A POST-ENRON ANALYSIS 7 (Federalist Soc'y for Law & Pub. Pol'y Studs. 2002) ("no case has been tried since the PSLRA went into effect: all have either been settled or dismissed"); Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991); Patrick M. Garry et al., *The Irrationality of Shareholder Class Action Lawsuits*, 49 S.D. L. REV. 275, 287 n.98 (2004) (citing studies).

from being resolved against him by dismissal or summary judgment." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739-40 (1975) (observing that "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general"); *accord Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1106 (1991) ("The issues would be hazy, their litigation protracted, and their resolution unreliable. Given a choice, we would reject any theory . . . that raised such prospects . . . ."). The threat of costly and disruptive discovery adds an additional "*in terrorem* increment" to the settlement value of even meritless claims. *Blue Chip Stamps*, 421 U.S. at 741. For that reason, this Court has repeatedly rejected open-ended rules of uncertain application that would make Section 10(b) cases "virtually impossible to dispose of prior to trial other than by settlement," "no matter how improbable the allegations." *Id.* at 742. Similarly, Congress sought to reduce the number of vexatious lawsuits in enacting the PSLRA.[10]

### B. Petitioner's "Purpose and Effect" Test Would Deter Beneficial Economic Activity by Financial Services Companies.

Petitioner's "purpose and effect" test would subject nearly every form of business transaction, including normal

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[10] *See* S. REP. NO. 104-98, at 19 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 679, 698 ("amending the 1934 Act to provide explicitly for aiding and abetting liability actions under Section 10(b) would be contrary to [the] goal of reducing meritless securities litigation."); 141 CONG. REC. S8896 (daily ed. June 22, 1995) (statement of Sen. Domenici) ("It is time that we stop vexatious securities litigation, and fix it we will."); *see also* H.R. REP. NO. 104-369, at 32 (1995) (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. 730, 731 ("This Conference Report seeks to protect investors, issuers, and all who are associated with our capital markets from abusive securities litigation. This legislation implements needed procedural protections to discourage frivolous litigation.").

commercial lending and other financial transactions, to challenge in a securities fraud class action. Structured finance transactions and derivatives transactions, such as those engaged in by *Amici*'s members to meet the needs of their customers, would be particularly vulnerable to coercive litigation because of the complexity of such transactions.

Every day, the U.S. banking industry engages in a wide variety of activities that finance the spending and investment of large and small businesses and enable them to engage in risk mitigation. Such transactions take many forms, and they are often structured by the borrower to achieve the most beneficial legal, tax or accounting result—a practice that is both legitimate and commonplace. The dynamic nature of accounting, tax and other regulatory rules further contributes to the complexity of such transactions and the need for innovation, as companies seek to customize transactions to meet their unique needs through such "structured finance" transactions.

Structured finance is critically important to the strength and growth of our economy. In these transactions, a company satisfies its goal of receiving funds, while at the same time meeting various other objectives, including minimizing or altering its risks, affecting the manner in which an asset and/or debt will be held, and lowering the cost of capital and funding.[11]

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[11] *See Oversight of Investment Banks' Response to the Lessons of Enron: Hearing Before the Permanent Subcomm. of Investigations of the S. Comm. on Governmental Affairs*, 107th Cong. 120 (2002) (statement of Richard Spillenkothen, Federal Reserve, Director, Division of Banking Supervision and Regulation) [hereinafter Spillenkothen testimony] ("To the economy's benefit, the structured finance business has led to a lower cost of capital to businesses and consumers, which has helped fuel greater access to credit and longer term growth."); *id.* at 134 (statement of Annette Nazareth, SEC, Director, Division of Market Regulation (and now an SEC Commissioner)) ("Structured finance plays an important role

The U.S. banking industry also engages in a large volume of derivatives transactions each year. As of year-end 2006, U.S. banks held derivatives with a notional value of $131.5 trillion, while the notional value of derivatives outstanding globally amounted to $327.3 trillion.[12] The banking industry uses derivatives transactions to protect against risks to which banks and their customers are exposed, including interest-rate or foreign-exchange-rate movements and credit-default risks.

Many of these transactions are inherently complex and customized and present difficult accounting issues and judgments even for professional accountants.[13] Accountants and other professional advisors for large companies spend literally thousands of hours reviewing such transactions (and the issuer's financial statements) for the purpose of determining the issuer's compliance with tax, accounting and other legal obligations.

It is counterproductive, and contrary to Congress's intent and sound public policy, to expect financial institutions to police the accounting judgments of their public-company counterparties. Financial institutions generally are in no position to do so, and such institutions should not be subject

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in the modern business environment. When used properly, it can provide needed liquidity and funding sources, investment opportunities, and can facilitate risk dispersion.")

[12] OFFICE OF THE COMPTROLLER OF CURRENCY, OCC'S REPORT ON BANK DERIVATIVES ACTIVITIES, FOURTH QUARTER 2006 7, 9 (2006), *available at* http://www.occ.treas.gov/ftp/deriv/dq406.pdf; Int'l Swaps & Derivatives Ass'n, Summaries of Market Survey Results, http://www.isda.org/statistics/recent.html (last visited August 7, 2007).

[13] *See, e.g.*, Todd Davenport, *The Uneven Evolution of Accounting Standards*, AMERICAN BANKER, July 28, 2004, at 17 ("Derivatives is the kind of thing where even the people trying to do it right end up making honest mistakes because it can be just so immensely complicated.").

to coercive securities class actions if those judgments by their counterparties and their advisors turn out to be incorrect or subject to dispute.[14] But Petitioner's proposed standard would impose such a burden on banks and thus would deter, or at least sharply raise the cost of, derivatives and structured-finance transactions, significantly eliminating the benefits of such transactions for U.S. businesses.

These costs are wholly unwarranted, particularly because Congress in the PSLRA expressly authorized the SEC to bring enforcement actions against, and levy substantial fines on, aiders and abettors. In addition, the prospect of prosecutions and other actions by the Department of Justice, state attorneys general, and self-regulatory organizations such as the Financial Industry Regulatory Authority, provides another meaningful layer of deterrence against such conduct and penalties for misconduct that accrue to investors who have been harmed. In contrast, Section 10(b) suits often serve to enrich lawyers, while providing relatively little compensation for investors.[15] In these

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[14] *See* Spillenkothen Testimony, *supra* note 11, at 119 (stating that banks should not "be required to second guess their customer's accountants, tax or legal experts or police their customer's activities. Such an expectation would require, inappropriately, banking organizations to assume management responsibility for their customers, place potential legal liability on banking organizations that would compromise their ability to perform their role as financial intermediaries or threaten their safety and soundness, and place significant costs on banking organizations to audit the activities of their customers.").

[15] *See* John C. Coffee, Jr., *Reforming the Securities Class Action*, 106 COLUM. L. REV. 1534, 1538 (2006) ("Securities class actions essentially impose costs on public shareholders in order to compensate public shareholders. This is a circular process whose perverse effects are compounded by the twin facts that (a) public shareholders tend to be diversified (and thus are on both sides of the wealth transfer), and (b) on each such transfer a significant percentage of the transfer payment goes to lawyers and other agents."). Indeed, a study of 500 securities fraud class actions filed after passage of the PSLRA concluded that they destroyed

circumstances, this Court should not create a cause of action that would upset the policy judgment that Congress made in the PSLRA.

## III. THE COMMON LAW DOES NOT SUPPORT PETITIONER'S "SCHEME" THEORY.

Several of Petitioner's *amici* try to support Petitioner's expansive reading of Section 10(b) by claiming that it is justified because the Vendors' conduct constituted actionable fraud at common law, which Congress sought to expand with the 1934 Act. (*See* Br. of N. Am. Sec. Administrators Ass'n, Inc. ("NASAA Br.") 7-8; Br. of Am. Ass'n for Justice ("AAJ Br.") 12-16, 18; Br. of Change To Win and the CtW Investment Group ("CTW Br.") 4-5, 12-13, 18-19.) These arguments are misplaced.

First, whatever the state of the common law in 1934, this Court has since authoritatively construed the meaning of Section 10(b) and determined that this statute does not reach conduct, such as the Vendors' conduct here, that constitutes aiding and abetting, a conclusion that Congress subsequently ratified in the PSLRA. In any event, Petitioner could not have recovered against the Vendors in an action for common law fraud; at most, the Vendors' conduct would have amounted to a common law aiding-and-abetting claim, which cannot be imported into Section 10(b).

This appeal to the purported common law antecedents of Section 10(b) is not new. Notably, Petitioner's *amici* today

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on average 3.5 percent of the equity value of the defendants, resulting in $25 billion in shareholder wealth being "wiped out just due to litigation." ANJAN V. THAKOR, THE UNINTENDED CONSEQUENCES OF SECURITIES LITIGATION 14 (U.S. Chamber Institute for Legal Reform 2005), *available at* http://www.instituteforlegalreform.org/issues/docload.cfm?docId=857. By reducing the equity value of defendants, abusive securities fraud litigation results in lower capital investment, which in turn "has obvious implications for job creation and economic growth." *Id.*

invoke the same appeals to the common law in support of "scheme" liability that respondents in *Central Bank* unsuccessfully raised in trying to persuade this Court that Congress intended Section 10(b) to include a cause of action for aiding and abetting. Brief for Respondents at *15-17, *Central Bank*, 511 U.S. 164 (No. 92-854), 1993 WL 407323. The only difference between the arguments advanced by respondents in *Central Bank* and the arguments of Petitioner's *amici* here with respect to common law "antecedents" is that the former used the phrase "aiding and abetting" and the latter use the word "scheme."

### A. The Common Law Has No Bearing on the Interpretation of Section 10(b).

In passing the 1934 Act, Congress did not create or intend to create the private right of action the courts subsequently implied under Section 10(b). *See Blue Chip Stamps*, 421 U.S. at 729-30 (legislative history does not provide "any indication that Congress considered the problem of private suits under [Section 10(b)] at the time of its passage" and "there is no indication that the Commission in adopting Rule 10b-5 considered the question of private civil remedies under the provision"); *see also Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 358-59 (1991). Thus, Congress could not have intended to import the common law to construe a cause of action it did not create.

Because the private Section 10(b) cause of action is an implied right of action, reliance on tort principles for interpretation "is entirely misplaced." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979) (declining to recognize implied private right of action under Section 17(a) of the 1934 Act based on common law tort principles); *see also Central Bank*, 511 U.S. at 178, 184; *Pinter*, 486 U.S. at 649, 652 (construing Section 12 of the 1933 Act; rejecting plaintiffs' interpretation, which was "grounded in tort doctrine," finding "no congressional intent to incorporate tort

law doctrines"); *Virginia Bankshares*, 501 U.S. at 1110 (Scalia, J., concurring) (reliance on tort law inappropriate because "the federal cause of action at issue here was never enacted by Congress").

Reliance on common law is especially inappropriate where, as here, this Court has interpreted the statutory language in question. "[W]here the Supreme Court has authoritatively construed the pertinent language of the statute giving rise to the plaintiffs' cause of action, the common law meaning of that language is irrelevant." *Regents*, 482 F.3d at 389. As this Court noted in *Zandford*, Section 10(b) "must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation of § 10(b)." 535 U.S. at 820; *accord Marine Bank* v. *Weaver*, 455 U.S. 551, 556 (1982) ("Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud.").

### B. "Scheme" Claims Would Amount to No More Than Aiding and Abetting or Conspiracy Claims at Common Law.

#### 1. Common Law Fraud Requires Reliance by the Plaintiff on the Defendant's Misrepresentation.

Petitioner's fraud claims against the Vendors would have failed at common law in 1934 on one of the primary bases such claims fail under Section 10(b) today—lack of reliance.

The cause of action for "deceit," the predecessor to fraud at common law, was not an expansive one.[16] Indeed, as

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[16] *See* LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 910 (5th ed. 2004). The common law elements of a cause of action for deceit were (1) a false representation of (2) material fact (3) knowingly made by the defendant for the purpose of inducing plaintiff to rely on it, (4) justifiable reliance by plaintiff and (5) resulting damages. *Id.*

Professors Loss and Seligman note, at common law, "[i]n effect, the charge of deceit . . . is an accusation of thievery." LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 911 (5th ed. 2004).

When Congress enacted the 1934 Act, the law of deceit was well-illustrated by the landmark English case of *Peek* v. *Gurney*, (1873) L.R. 6 H.L. 377. In that case, the House of Lords held that directors of a corporation were not liable for deceiving a plaintiff who relied on false representations made in a prospectus authored by those defendants because the directors had no dealings with plaintiff and did not intend that plaintiff rely on the representations in question, which were directed only at initial purchasers of the company's stock. In that decision, Lord Chelmsford, after an extensive review of precedent, explained the rule:

> It appears to me that there must be something to connect the directors making the representation with the party complaining that he has been deceived and injured by it; . . . . In all these cases the parties in one way or another are brought into direct communication; and in an action the misrepresentation would be properly alleged to have been made by the Defendant to the Plaintiff; . . . .

*Id.* at 399-400. Lord Colonsay similarly concluded that "in a case of this kind it is necessary to make out some direct connection between the directors and the party who alleges that he was deceived." *Id.* at 401.

Courts addressing fraud claims after *Peek* repeatedly cited and relied on that decision to reject claims that were not based on direct communications.[17] In order to recover, it was

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[17] *See, e.g., Hindman* v. *First Nat'l Bank of Louisville*, 112 F. 931, 942-43 (6th Cir. 1902) ("It has never been a ground of action that the defendant made a dishonest representation, and that the plaintiff relied

necessary for plaintiff to show, among other things, that the plaintiff relied on the defendant's misrepresentation. Because the plaintiffs did not rely (and could not rely) on anything the Vendors said or did, Petitioner's claim against the Vendors therefore would have failed at common law.

### 2. The Common Law Authorities Cited by Petitioner's *Amici* Do Not Support Its "Scheme" Theory.

Petitioner's *amici* cite numerous decisions in support of their argument that the Vendors would be liable at common law, but notably, *Peek* v. *Gurney* is not among them. Furthermore, their discussion of the case law is characterized by both a disregard of the pertinent facts and holdings and a preoccupation with *dicta* in those decisions, none of which in any event remotely resembles the facts alleged to create liability against the Vendors here. As this Court has noted, "the typical fact situation in which the classic tort of misrepresentation and deceit evolved was light years away from the world of commercial transactions to which Rule 10b-5 is applicable." *Blue Chip Stamps*, 421 U.S. at 744-45.

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upon it and sustained injury. . . . unless [the plaintiff is] able in one way or another to bring [himself] within the class of persons for whom the representation was intended."); *Merchants' Nat'l Bank* v. *Armstrong*, 65 F. 932, 939, 940 (C.C.S.D. Ohio 1895) ("That such a [false] representation was so made somewhere, at some time, to some person, by the persons sought to be charged, is not sufficient; it must be made to the person seeking to charge them."); *Dinsmore* v. *National Hardwood Co.*, 208 N.W. 701, 702, 703 (Mich. 1926) (plaintiff's fraud claim against defendant fails even though defendant knowingly made false representation on which plaintiff relied because plaintiff's injury "too remote") (quoting *Hindman*, 112 F. at 941); *Brackett* v. *Griswold*, 20 N.E. 376, 380, 381 (N.Y. 1889) ("In order to recover in an action for fraud and deceit the fraud and injury must be connected.")

Most of the decisions cited by Petitioner's *amici* involve a situation where the defendants themselves had direct dealings with the plaintiff and/or engaged in the fraudulent acts on which the plaintiff relied, causing plaintiff injury. *See, e.g., Pennebaker* v. *Kimble*, 269 P. 981, 984 (Or. 1928) (plaintiff dealt directly with defendants, whose conduct falsely represented facts on which plaintiff relied); *Crompton* v. *Beedle*, 75 A. 331, 332 (Vt. 1910) (defendant-purchaser defrauded plaintiff-seller of land parcel by affirmative representation that was incomplete and hence misleading); *Noved Realty Corp.* v. *A.A.P. Co.*, 293 N.Y.S. 336, 340-41 (App. Div. 1937) (to the same effect); *Stewart* v. *Wyoming Cattle-Ranche Co.*, 128 U.S. 383, 383-84 (1888) (same); *Laidlaw* v. *Organ*, 15 U.S. (2 Wheat.) 178, 185-90 (1817) (same). In other cases, defendants who did not have direct dealings with the plaintiff were held liable on agency principles. *See, e.g., Downey* v. *Finucane*, 98 N.E. 391, 393 (N.Y. 1912); *Purdum* v. *Edwards*, 141 A. 550, 553 (Md. 1928).[18]

Petitioner's *amici* also seek to rely on various common law doctrines that are inapposite, distorted, or, in one case, non-existent, in an attempt to excuse their inability to satisfy the reliance requirement of a common law fraud claim.

*Misrepresentations by "Conduct."* Some of Petitioner's *amici* argue that the Vendors may be liable because they made misrepresentations by "conduct." (*See* CTW Br. 14-17; *see also* AAJ Br. 14 (common law recognized "that fraud can be effected by conduct"); *id.* at 16-17 (citing RESTATEMENT (FIRST) OF TORTS §§ 525, 533

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[18] Petitioner does not contend that the Vendors could be liable because Charter was their agent, and in any event Congress enacted a specific provision in the 1934 Act to define the scope of secondary liability for a Section 10(b) violation. *See* 15 U.S.C. § 78t(a).

(1938).) This argument is a red herring. The Eighth Circuit did not hold, and *Amici* do not argue, that conduct cannot be the basis for a securities fraud claim. Rather, as the cases cited by Petitioner's *amici* demonstrate, the conduct at issue must *itself* deceive the plaintiff. *See, e.g., District Motor Co.* v. *Rodill*, 88 A.2d 489, 493-94 (D.C. 1952) (liability for turning back odometer of car to "represent" to plaintiff that car was newer than it was); *Salzman* v. *Maldaver*, 24 N.W.2d 161, 167 (Mich. 1946) (defendant-seller defrauded plaintiff-purchaser in sale of aluminum sheets by placing undamaged sheets on top of each bundle of corroded and damaged sheets and thereby deceiving plaintiff as to quality of aluminum); *Lindberg Cadillac Co.* v. *Aron*, 371 S.W.2d 651 (Mo. Ct. App. 1963) (defendant-seller defrauded plaintiff-purchaser in sale of car by painting over a crack in car's motor block).

Here, by contrast, Petitioner does not allege or contend that the Vendors' conduct *itself* deceived any investor. Rather, using the *Aron* decision by way of example, the Vendors' conduct cannot be compared to a car salesman painting over a crack to deceive the car buyer; at most, the Vendors' conduct is analogous to paint shops that sold the paint allegedly knowing that the salesman would use the paint for such a purpose. Or, in *Rodill*, the Vendors' conduct is equivalent to the car manufacturer that failed to install a tamper-proof lock on the odometer allegedly knowing that it was very likely that the odometer would be tampered with to deceive prospective purchasers.

Viewed most favorably to Petitioner, the Vendors' conduct here amounted to a representation that the transactions at issue occurred on a particular date and that the pricing increase for the set-top boxes sold to Charter was due to increased manufacturing costs.[19] It is undisputed that no

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[19] *Amicus* Change to Win's argument that the Vendors' conduct "amounted to an assertion regarding the financial condition of Charter

such misrepresentations were made to, or relied upon by, Petitioner and other investors. The purported misrepresentations on which plaintiffs relied concerned the reported financial condition of Charter, which misrepresentations were made by Charter, *not* the Vendors, and which required Charter's intervening application of accounting rules.

Certain of Petitioner's *amici* also cite Section 533 of the RESTATEMENT OF TORTS. (*See* AAJ Br. 17-18; Br. for *Amici Curiae* States of Arkansas et al. 24-26.) Section 533 has no bearing here because Charter's investors did not rely on any "information" furnished by the Vendors. (*Cf.* Br. for *Amici Curiae* States of Arkansas et al. 26 (positing that "relevant question is whether information supplied by the (anonymous) actor was relied upon by the public").) Rather, Petitioner alleges that the Vendors "backdated" and otherwise falsified transaction documentation that was not seen, or intended to be seen, by investors, but instead was for the purpose of deceiving Charter's auditors so as to enable Charter to misrepresent the cash flows and revenues associated with those transactions to its investors. This alleged pattern is easily distinguishable from the scenario described in Section 533, which, in addition to requiring reliance by the plaintiff (absent here), requires that the misrepresentation be "made to a third person for the purpose of having him repeat its terms or communicate its substance to" the plaintiff.

"*Liability for All Participants in a Fraud.*" Certain of Petitioner's *amici* claim that the Vendors would be liable for fraud at common law, because "the common law of fraud

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that was not in accordance with the truth" (CTW Br. at 16) is without any foundation. The alleged conduct of the Vendors could not have constituted such a "representation" even to Charter's auditors (the only ones alleged to have seen the documents in question), much less Charter's investors.

historically attached primary liability to all of the participants in a fraudulent scheme." (NASAA Br. 9.) But this argument completely fails to distinguish liability for engaging in fraud from liability for aiding and abetting or conspiring to commit such fraud.[20] Indeed, Petitioner's *amici* do not dispute that common law liability for aiding and abetting fraud predates the 1934 Act. *See, e.g., Hobbs* v. *Boatright*, 93 S.W. 934, 939-40 (Mo. 1906); *Virtue* v. *Creamery Package Mfg. Co.*, 142 N.W. 930, 939 (Minn. 1913) (those who "aid or abet" a tort are "jointly and severally liable therefor"); *White* v. *Moran*, 134 Ill. App. 480, 491-92 (App. Ct. 1907); *Judson* v. *Cook*, 11 Barb. 642, 644 (N.Y. Gen. Term 1852); *see also* RESTATEMENT (FIRST) OF TORTS § 876(b) (1939). In *Central Bank*, this Court made clear that aiding-and-abetting liability was not imported into Section 10(b) by Congress. 511 U.S. at 184-85.

Petitioner's *amici* simply do not distinguish between liability based on aiding and abetting and conspiracy and the liability of a primary wrongdoer, which among other things requires reliance. Thus, for example, in holding the defendant liable for aiding and abetting, the *Hobbs* court acknowledged that plaintiff could not establish a primary fraud claim against the alleged aider and abettor because, as here, the plaintiff could not prove reliance. 93 S.W. at 939.

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[20] Respondents in *Central Bank* and certain of its *amici* (as well as the SEC) made similar common law arguments to try and persuade the Court that Section 10(b) prohibited aiding and abetting, arguing that by 1934 common law liability for aiding and abetting was "well-established." *See* Brief for Respondents at *15, *Central Bank*, 511 U.S. 164 (No. 92-854), 1993 WL 407323; Brief for the Securities and Exchange Commission as *Amicus Curiae* in Support of Respondents at *10, *Central Bank*, 511 U.S. 164 (No. 92-854), 1993 WL 13006275; Brief of *Amicus Curiae* Trial Lawyers for Public Justice et al. in Support of Respondents at *13, *Central Bank*, 511 U.S. 164 (No. 92-854), 1993 WL 13006270.

*"Duty Not To Commit Fraud."* One *amicus*, Change to Win, maintains that the Vendors' "fraudulent conduct amounted to a misrepresentation and concealment," and that the Vendors had a common law duty to refrain from such conduct because "one who acts inherits a duty to act nondeceptively." (CTW Br. 22; *see also id.* at 18-23.) Change to Win cites no authority for this proposition,[22] which directly contravenes *Central Bank*. Change to Win claims that a duty is not required to impose liability on the Vendors because "a duty to refrain from fraudulent conduct" suffices. (*Id.* at 22.)[23] Even putting aside the circular reasoning of this argument, neither the common law nor federal securities law imposes a duty of disclosure on the Vendors to *plaintiffs*, to whom the Vendors never communicated at all, whether through words or conduct.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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[22] This is unsurprising, as the common law was to the contrary. *See, e.g.*, Harry Shulman, *Civil Liability and the Securities Act*, 43 YALE L. J. 227, 238-39 & n.46 (1933) ("Both in [common law] negligence and in deceit, the issue as to whether or not the defendant owed any duty to the particular plaintiff with respect to the representations is primary. . . . That issue has insulated a large class of persons involved on the seller's side in the sale of securities against misrepresentation suits by a large class of investors.") (citing cases).

[23] Change To Win purports to distinguish this Court's insider trading cases as cases involving "pure silence" rather than "conduct" because the trading activity is "not itself deceptive in nature." (CTW Br. 21-22 & n.20.) This distinction makes no sense. This Court has determined in those cases that the "conduct" of trading securities based on the possession of material, non-public information is "deceptive" only when it is done in violation of a fiduciary duty to disclose. *See, e.g.*, *Chiarella*, 445 U.S. at 230; *see also O'Hagan*, 521 U.S. at 660.

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